STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 13, 2007
v	No. 265911 Wayne Circuit Court
DORAILONTIE MARTEL STRAWTHER, Defendant-Appellant.	LC No. 05-007345-01

Before: Kelly, P.J., and Davis and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for assault with intent to do great bodily harm (GBH), MCL 750.84, felon in possession of a firearm, MCL 750.224f, felonious assault, MCL 750.82, possession of a firearm during the commission of a felony, MCL 750.227b, and malicious destruction of property valued between $200 and $1,000, MCL 750.377a(1)(c)(i). In convicting defendant of assault with intent to do GBH, the jury acquitted him of the greater offense of assault with intent to murder, MCL 750.83. Defendant was sentenced, as a second habitual offender, MCL 769.10, to two years' imprisonment for felony-firearm to be served consecutive to his concurrent sentences of 7 ½ to 15 years' imprisonment for assault with intent to do GBH, two to five years' imprisonment for felon in possession of a firearm, two to four years' imprisonment for felonious assault, and 77 days time served for malicious destruction of property. We vacate defendant's conviction and sentence for felonious assault. We reverse the remainder of defendant's sentences and remand for resentencing under the corrected statutory sentencing guidelines. We affirm in all other respects.

Defendant first contends that his convictions for assault with intent to do GBH and felonious assault violate his right to be free from double jeopardy. We agree. We review an unpreserved constitutional error for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

For a successful double jeopardy claim based on multiple punishments, a defendant's guilt must arise from the same conduct or acts. *People v Hill*, 257 Mich App 126, 150; 667 NW2d 78 (2003). Furthermore, in determining whether the imposition of multiple punishments violates double jeopardy, we must consider whether the Legislature intended the punishments for the offenses to be cumulative. *People v Calloway*, 469 Mich 448, 451; 671 NW2d 733 (2003). "Where two statutes prohibit violations of the *same* societal norm, albeit in a different manner, as a general principle it can be concluded that the Legislature did not intend multiple punishments."

People v Herron, 464 Mich 593, 605; 628 NW2d 528 (2001) (emphasis in original). The Legislature's intent can also be determined by reviewing the amount of punishment that is statutorily authorized. *People v Denio*, 454 Mich 691, 708; 564 NW2d 13 (1997). "Where one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes." *Id.*, quoting *People v Robideau*, 419 Mich 458, 487; 355 NW2d 592 (1984).

"The elements of felonious assault are: (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The elements of assault with intent to commit GBH are: "'(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.'" *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), quoting *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). This Court has defined the intent to do GBH as "'an intent to do serious injury of an aggravated nature.'" *Brown*, *supra* at 147, quoting *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986). Felonious assault requires a weapon, whereas GBH requires specific intent to cause an aggravated injury to the victim. However, felonious assault and assault with intent to do GBH protect against the violation of the same societal norm, i.e., the assault of other citizens. The hierarchical nature of the punishments for escalating kinds of assault violations, from simple assault and battery, MCL 750.81, to felonious assault, MCL 750.82, to assault with intent to do GBH, MCL 750.84, shows a Legislative intent to proscribe the same general offense – an assault – by imposing an escalating punishment depending on the severity of the assault.

The prosecution argues that double jeopardy is not violated here because defendant's convictions arose from two separate and distinct offenses. The victim was sitting in his car when defendant approached with a gun and shot the victim in the thigh. Defendant then raised the gun to the victim's head, and the victim drove away. Defendant shot after the victim, shattering a rear window of the victim's car. The prosecution argues that the victim's flight was a separating event, so the assault with intent to commit GBH was complete before the felonious assault occurred. Defendant asserts that only one continuous act took place, making his crime a single assault. Double jeopardy is not implicated "if one crime is complete before the other takes place." *Lugo*, *supra* at 708; see also *People v Colon*, 250 Mich App 59, 63-64; 644 NW2d 790 (2002). In *Lugo*, the defendant attacked a police officer with a broom, then dropped the broom and seized the officer's gun in a separate and distinct act. In *Colon*, the defendant beat the victim over the course of an hour and a half, but individual, discrete beatings were interspersed with leaving the victim to look for money in the victim's house. In contrast, the testimony here indicates that after firing the gun once, defendant was already in the process of preparing to fire again in a single transaction when the victim drove away and defendant fired after the departing car. The victim driving away did not terminate one assault only to have defendant initiate a new one; rather, this appears to have been one continuous act.

The appropriate remedy when a defendant is unconstitutionally given multiple punishments for a single offense is to affirm the greater conviction and sentence but vacate the conviction and sentence for the lesser offense. *Herron*, *supra* at 609-610. Accordingly, we vacate defendant's conviction and sentence for felonious assault.

Defendant also contends that the sentencing court erroneously scored prior record variable (PRV) 6 and PRV 7. We agree.

The proper interpretation of the statutory sentencing guidelines is a legal question that we review de novo. *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006). A trial court has discretion in determining the number of points to be scored for the sentencing variables, provided that record evidence adequately supports the score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). If the minimum sentence is within the appropriate guidelines range, we "shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10).

The prosecution agrees with defendant that the trial court erroneously assessed 20 points under PRV 6. Under MCL 777.56(1)(a), a defendant should be assessed 20 points if "the offender is a prisoner of the department of corrections or serving a sentence in jail" and 10 points if "the offender is on parole, probation, or delayed sentence status or on bond awaiting adjudication or sentencing for a felony." A "prisoner" explicitly includes an "escapee." MCL 777.56(3)(b). The score is to be based on the offender's status at the time the charged offense was committed, not at the time of trial. See *People v Jarvi*, 216 Mich App 161, 164-165; 548 NW2d 676 (1996); *People v Maben*, 208 Mich App 652, 653-654; 528 NW2d 850 (1995). Defendant was neither in jail nor in prison at the time of his convicted offenses, and he was not an escapee; rather, he was serving a probationary term for a prior conviction. Therefore, he should properly have been scored 10 points. The trial court erroneously concluded that it was impossible for a defendant to commit a crime while incarcerated; however, it is perfectly possible to assault a corrections officer or to assault anyone else while an escapee.

Defendant also challenges the trial court's assessment of 20 points for PRV 7. Under MCL 777.57, a defendant should be assessed 20 points for two or more concurrent convictions and 10 points for one concurrent conviction. Felony-firearm is specifically excluded, and malicious destruction of property is inapplicable because it is a misdemeanor. Because we vacate defendant's felonious assault conviction, defendant had only one concurrent felony conviction, felon in possession of a firearm. Therefore, the trial court should have scored PRV 7 at 10 points, rather than 20. As a result, defendant's PRV score should be reduced from a total of 75 to a total of 55, which reduces his PRV level from F to E. Assault with intent to do GBH is a Class D felony, and defendant's Offense Variable score is 65. As a habitual offender, second offense, defendant's adjusted minimum sentencing guidelines range is 34 to 83 months. MCL 769.10; MCL 777.65. Defendant's minimum sentence of 90 months exceeds the minimum range, and the trial court did not provide substantial and compelling reasons for this departure on the record. *People v Babcock*, 469 Mich 247, 262-262; 666 NW2d 231 (2003). Therefore, defendant is entitled to resentencing pursuant to MCL 769.34(11).

Defendant next argues that the prosecutor engaged in misconduct by improperly vouching for the credibility of the state's witnesses, improperly denigrating the veracity of the defense witnesses, and appealing to the jury's civic duty to convict. We disagree. We review prosecutorial misconduct claims on a case-by-case basis, examining any remarks in context, to determine if the defendant received a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). However, defendant only objected to the prosecutor's observation that an eyewitness improperly failed to appear before trial to make a statement on

defendant's behalf. To the extent that this challenge is unpreserved, our review is limited to plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764.

We disagree that the prosecutor vouched for the credibility of the victim. A prosecutor may not imply that he or she has special knowledge concerning the veracity of trial witnesses and vouch for the credibility of state witnesses. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, the prosecutor is free to argue the record evidence. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). The prosecutor here noted that the victim testified despite threats and offers of a bribe, which was an accurate statement based on the record evidence. The prosecutor also argued that the victim's testimony was "unwavering" and that defendant's story was not worthy of belief compared to the victim's story. This was merely a comment on the victim's demeanor and a rational argument challenging defendant's theory of self-defense. The prosecutor could properly argue that it made little sense for Leonard to attack, unprovoked, a young man who was related to friends and acquaintances.

Defendant also contends that the prosecutor improperly challenged the veracity of the defense witnesses by describing the uncooperativeness of defendant's friends and family and further contended that witness Lashawn Harper "has a record of being in trouble . . . involving theft or dishonesty . . . ." The prosecutor also challenged Harper's credibility by noting that he did not make a statement on defendant's behalf until the day of trial. The prosecutor is free to make arguments based on the evidence presented at trial and reasonable inferences arising from that evidence. *Ackerman*, *supra* at 450. The testifying officers stated that they questioned several individuals at the Strawther and Harper houses. All of the individuals denied hearing gunshots on the day of the incident and denied knowing "Shawn Harper" while failing to mention that "Lashawn Harper" lived at the Lawrence Street residence. Despite the fact that defendant was in jail, neither Harper nor Burns came forward to make a statement until the weekend before trial. Furthermore, officers testified that they canvassed the neighborhood looking for witnesses, and Harper admitted on the stand that he had been convicted on two occasions for stealing an automobile. The prosecutor's remarks were based on the record evidence and were fair arguments that the defense witnesses appeared incredible.

Finally, the prosecutor stated in closing argument that "[s]omething horrible happened to Mr. Leonard and he's looking to you for justice today . . . . I'm going to ask that you do the right thing at the end of this trial. I'm going to ask that you give justice for Mr. Leonard for what happened to him . . . . Hold him accountable for what he did to Mr. Leonard . . . ." A prosecutor may not tell the jury that they should convict as part of their "civic duty." *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004). It is also improper for the prosecutor to appeal to the jury's sympathy for the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). However, we do not perceive an argument based on civic duty or sympathy for the victim. Rather, the prosecutor argued, based on the record evidence, that the elements of the charged offenses were proven beyond a reasonable doubt and that defendant was the aggressor.

Defendant next contends that he was denied the effective assistance of counsel because defense counsel suddenly changed strategies on the first day of trial. We disagree. Two weeks before trial, defense counsel apparently indicated to the trial court and to the prosecutor that she intended to pursue an alibi defense, but that she was still interviewing potential witnesses and was unprepared to file a written notice of alibi at that time. At the beginning of trial, defense counsel changed tactics and chose to proceed with the theory of self-defense.

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The failure to call or question witnesses amounts to ineffective assistance of counsel if the failure deprives defendant of a substantial defense, i.e., one that would have affected the outcome of the case. *Rockey*, *supra* at 76; *People v Hoyt*, 185 Mich App 531, 537; 462 NW2d 793 (1990).

Defendant alleges that trial counsel was ineffective for failing to prepare fully for trial, because counsel failed to develop the self-defense theory properly by finding potential witnesses and by presenting an inferior, last-minute alternative defense theory. We disagree. It appears that defendant misled defense counsel into believing that various potential witnesses would provide an alibi defense. In the weeks leading up to trial, defense counsel questioned the various potential witnesses named by defendant. Apparently, these witnesses were unwilling or unable to provide an alibi for defendant at the time of the shooting. Therefore, defense counsel was required to change tactics. Under the circumstances, defendant cannot establish that any prejudice caused by this change was defense counsel's fault. Rather, it appears that defendant caused defense counsel to waste her time trying to form an alibi defense at the expense of preparing a self-defense case. Moreover, defendant has not identified any other potential witnesses that defense counsel could have called to establish the theory of self-defense and has not described the potential content of their testimony. We will not search for support for defendant's argument, so in the absence of any provided by defendant, we deem this issue abandoned. *Watson*, *supra* at 587. In any event, defense counsel cross-examined the victim regarding his motives for returning to the scene following his initial altercation with defendant and presented testimony tending to suggest that the victim had been the aggressor. Defense counsel adequately argued the theory of self-defense at trial, so we cannot conclude that defense counsel was ineffective or that the change of strategy affected the outcome of the case.

Defendant contends that the trial court abused its discretion by allowing the prosecutor to question Harper regarding whether he had been approached to provide an alibi for defendant. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *Babcock*, *supra* at 269. A trial court acts within its discretion when it selects one of these principled outcomes. *Maldonado*, *supra* at 388.

The trial court recognized that defense counsel had previously indicated that she intended to proceed with an alibi defense, so the court permitted the prosecutor to question witnesses on whether they had changed their stories from an alibi defense to self-defense. The court later ruled that the prosecutor could ask witnesses whether they had changed their stories, but could not reference defense counsel's previous statements regarding the alibi defense. The prosecutor asked a witness on cross-examination whether the witness was aware that he had originally been

listed as an alibi witness, to which defense counsel objected. The trial court permitted the prosecutor to rephrase and ask whether defense counsel had ever approached the witness to provide an alibi, which the witness denied. Defendant contends that he was prejudiced by this question. However, the question was a very small part of the three-day trial, the witness denied having been approached to provide an alibi, and the jurors were unaware of the significance of the question in any event. We cannot conclude that "it is more probable than not that a different outcome would have resulted without the error." *Lukity*, *supra* at 495.

Finally, defendant contends that the trial court improperly allowed the prosecutor to impeach a witness with evidence of that witness' prior conviction because the prosecutor had not disclosed that criminal record during discovery. Defendant also contends that defense counsel was ineffective for failing to object to its admission. We disagree with both assertions.

A party must disclose "any criminal record that the party may use at trial to impeach a witness." MCR 6.201(A)(1)(4). The parties are required to supplement mandatory discovery, without request, as they uncover additional, discoverable information. MCR 6.201(H). Failure to provide mandatory discovery gives the trial court discretion to craft a remedy that may include prohibiting the evidence from being introduced into evidence. MCR 6.201(J). However, "the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance." *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002). Here, the prosecutor did not learn of the witness' true identity until the eve of trial: the prosecution and the police were searching for a potential witness who they believed was named "Shawn Harper." However, no such individual existed, and the delay in learning that they were actually searching for "Lashawn Harper" was caused by defendant and defendant's family members. Defendant would not have been entitled to exclude the evidence when it was his own fault that it was not uncovered earlier, and trial counsel is not ineffective for failing to raise futile or meritless objections. *People v Thomas*, 260 Mich App 450, 457; 678 N2d 631 (2004).

Affirmed in part, vacated in part, reversed in part, and remanded for resentencing. We do not retain jurisdiction.

/s/ Kristen Frank Kelly
/s/ Alton T. Davis
/s/ Deborah A. Servitto